ARKANSAS COURT OF APPEAL
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CACR 06-1351

JUNE 27, 2007

JUSTIN ALEXANDER EWELL APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION, [NO. CR 05-3805]
V.	HONORABLE WILLARD PROCTOR, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Justin Alexander Ewell was convicted in a jury trial of six criminal offenses committed against Taylor McGrew and Arthur Chavis. Specifically, the jury convicted Mr. Ewell of two counts of aggravated robbery, two counts of kidnapping, one count of Class B felony theft of property against Mr. McGrew, and one count of Class A misdemeanor theft of property against Mr. Chavis. Mr. Ewell was sentenced to concurrent terms of incarceration amounting to a twenty-year prison sentence. On appeal, Mr. Ewell challenges only his conviction for Class A misdemeanor theft of property, arguing that the trial court erred in denying his motion for directed verdict as to that offense. We affirm.

Class A misdemeanor theft of property is committed if a person knowingly takes or exercises unauthorized control over the property, valued at $500 or less, of another person,

with the purpose of depriving the owner of the property. *See* Ark. Code Ann. § 5-36-103(a)(1) & (b)(4) (Repl. 2006). A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Smith v. State*, 68 Ark. App. 106, 3 S.W.3d 712 (1999). When a defendant challenges the sufficiency of the evidence, we review the evidence in the light most favorable to the State and will affirm the conviction if it is supported by substantial evidence. *Fairchild v. State*, 349 Ark 147, 76 S.W.3d 884 (2002). Evidence is substantial if it is of sufficient force and character that, with reasonable certainty, it will compel a conclusion one way or the other and pass beyond speculation or conjecture. *Carmichael v. State*, 340 Ark. 598, 12 S.W.3d 225 (2000).

The testimony of the victims established that, on the morning of July 20, 2005, they were outside a movie theater smoking cigarettes when three men approached asking if they wanted to smoke some marijuana. One of the men was Mr. Ewell. The victims agreed, and all of the men got into Mr. McGrew's sport-utility vehicle, with Mr. McGrew driving and Mr. Chavis in the front passenger's seat. Shortly thereafter, one of the men was dropped off at some apartments, leaving Mr. Ewell in the rear left seat and his accomplice in the rear right seat. After the men drove around smoking marijuana, the friendly exchange turned into a robbery.

According to the victims' testimony, as well as a confession given by appellant, the man in the rear right seat placed a miniature bat over Mr. Chavis's neck and stated, "this is a robbery." The assailants purported to have a gun, and during the episode they took Mr. Chavis's wallet and also his cell phone, which they threw out the window.

Mr. McGrew was ordered to drive through an ATM at his bank, where he withdrew $100 and gave it to the perpetrators. After that, Mr. McGrew was ordered to the back seat and Mr. Ewell began driving. Mr. Ewell drove the victims to some woods where they were left bound and gagged with duct tape. Not long after that, the victims were found by a park ranger, who called the police to report the crimes.

For reversal of his misdemeanor theft conviction committed against Mr. Chavis, Mr. Ewell notes that the information filed by the prosecutor alleged:

> The said defendant(s), in Pulaski County, on or about July 20, 2005, unlawfully, and knowingly did take unauthorized control over property of a value less than $500.00, to wit: CASH OF $100.00, such being the property of ARTHUR CHAVIS, with the purpose of depriving the owner thereof, against the peace and dignity of the State of Arkansas.

Mr. Ewell asserts that the evidence only proved that he and his accomplice exercised control over $100 in cash that was the property of Taylor McGrew.[1] In his motion for directed verdict, Mr. Ewell argued that there was no evidence regarding the "cash of Mr. Chavis." Mr. Ewell acknowledges on appeal that the State did prove that he exercised unauthorized control of Mr. Chavis's wallet and cell phone. However, because the State failed to provide any evidence that he exercised control over $100 that was the property of Mr. Chavis, as alleged in the State's information, Mr. Ewell argues that the trial court erred in denying his motion for directed verdict.

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[1]The State also charged appellant with Class A misdemeanor theft of $100 in cash committed against Mr. McGrew, but, inexplicably, that charge was *nol prossed* by the State after the State rested.

We hold that substantial evidence supports Mr. Ewell's conviction for Class A misdemeanor theft based on the testimony that Mr. Ewell exercised unauthorized control over Mr. Chavis's wallet and cell phone. Therefore, the trial court committed no error in denying appellant's motion for directed verdict. To the extent that Mr. Ewell is arguing that his conviction must be reversed because of a material variance between the wording of the information and the proof at trial, this issue is not preserved for review. This is because while Mr. Ewell did challenge the sufficiency of the evidence below, he never made a motion to dismiss based on material variance, and we will not address arguments mounted for the first time on appeal. *See Williams v. State*, 331 Ark. 263, 962 S.W.2d 329 (1998).

Affirmed.

PITTMAN, C.J., and HEFFLEY, J., agree.